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In the

SUPREME COURT OF THE UNITED STATES

October Term, 2002

ROBERT DALE MURR,
Petitioner

vs.

MARYELLEN THOMS, WARDEN,
Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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A. Is the decision of the Sixth Circuit in conflict with the decisions of this Court as it failed to recognize that a manifest miscarriage of justice occurred when Mr. Murr was sentenced in the absence of a jury finding on the specific three predicate drug offenses required for a C.C.E., in violation of due process of law?

B. Can a manifest miscarriage of justice in sentencing trigger 28 U.S.C. § 2255's "inadequate and ineffective" safety valve clause and, thus, be brought in a habeas corpus petition pursuant to 28 U.S.C. § 2241?

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

THE PETITIONER, ROBERT DALE MURR, by and through his attorney, Clifford J. Barnard, hereby respectfully petitions this Court to issue a writ of certiorari to review the judgment and opinion of the Sixth Circuit Court of Appeals entered on March 19, 2003. *See* Appendix B at page 33.

I. OPINIONS BELOW

United States Judge Henry R. Wilhoit, Jr. for the Eastern District of Kentucky, Lexington Division, issued an unpublished *Memorandum Opinion and Order* on November 21, 2001 denying Mr. Murr's 28 U.S.C. § 2241 petition. *See* Apx. A at page 24. On March 19, 2003, the Sixth Circuit affirmed the District Court's denial of Mr. Murr's claims in the unpublished opinion of *Murr v. United States*, ___ Fed.Appx. ___ (6th Cir.2003), 2003 WL 1463631 (6th Cir.(Ky.)). *See* Apx. B at page 33.

II. JURISDICTION

The date of the judgment which is sought to be reviewed is March 19, 2003.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C.§ 1254.1.III.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions involved in this petition are the United States Constitution's Fifth and Sixth Amendment due process clauses *See* Apx. C at page 41 and Apx. D at page 42.

The statutory provisions involved in this petition are 21 U.S.C. § 848 prior to November 18, 1988 and the amended provisions of 21 U.S.C. § 848 effective November 18, 1988.

See Apx. E at page 43 and Apx. F at page 44.

IV. STATEMENT OF THE CASE

A. Nature of the Case

On March 13, 1991, the Petitioner, Robert Dale Murr, as indicted with 12 codefendants and charged with one count of conspiracy to possess with intent to distribute cocaine, one count of engaging in a continuing criminal enterprise ("C.C.E.") and eleven counts of possession of cocaine with intent to distribute.

A jury convicted Mr. Murr on October 9, 1991 on the conspiracy and C.C.E. counts[1] and ten of the eleven substantive drug counts.[2] He was sentenced to 240 months imprisonment with five years of supervised release. Mr. Murr appealed to the Sixth Circuit and his conviction and sentences were affirmed on August 5, 1993 in a published opinion reported at *United States v. Phibbs*, 999 F.2d 1053 (6th Cir.1993).

Mr. Murr filed a *Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255*, which was

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1 The conspiracy count was subsequently vacated as a lesser-included charge of the C.C.E. count.

2 One of the substantive counts was subsequently set aside as duplicitous.

denied. The denial was affirmed by the Sixth Circuit on January 7, 2000 in a published opinion reported at *Murr v. United States*, 200 F.3d 895 (6th Cir.2000). In relevant part, the Sixth Circuit held that, because the jury had unanimously convicted Mr. Murr on nine substantive drug counts, the *Richardson*[3] error was harmless when the trial court failed to instruct the jurors that they had to agree unanimously about which violations constituted a continuing series of predicate offenses for C.C.E. purposes. No petition for writ of certiorari was brought in this Court.

On June 27, 2001, Mr. Murr filed an *Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 by a Person in Federal Custody* challenging the imposed 20 year mandatory minimum sentence, arguing that he should have been sentenced in the guideline range of 121 to 151 months. On November 21, 2001, the District Court entered an unpublished *Memorandum Opinion and Order* denying Mr. Murr's § 2241 motion in an unpublished opinion. *See* Apx. A at page 24. On March 19, 2003, the Sixth Circuit affirmed the District Court's decision. *See* Apx. B at page 33.

B. Statement of Facts

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3 *Richardson v. United States*, 526 U.S. 813, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999).

Mr. Murr was sentenced to 240 months, pursuant to the amended provisions of 21 U.S.C. § 848 (*see* Apx. F at page 44) which went into effect on November 18, 1988, instead of the provisions in force prior that date (*see* Apx. E at page 43). The amended provisions of 21 U.S.C. § 848 required a harsher mandatory minimum 20 year sentence be imposed rather than the mandatory minimum 10 year sentence in effect until November 18, 1988. Application of the pre-November 18, 1988 provisions would have entitled Mr. Murr to a guideline range sentence of 121 to 151 months. *See* U.S.S.G. § 2D1.5, Apx. H at page 46. The District Court applied the amended statutory provisions, notwithstanding the fact that the jury had not unanimously agreed on which three predicate drug violations supported the C.C.E. conviction.

The *Indictment* alleged, and the evidence at trial showed that the charged offenses occurred, on the following dates:

Counts	Dates	
1	5/1/88 - 3/13/91	
2	8/25/88	***
3	9/88	***
4	10/88	***
5	11/88	***
6	2/89	
7	3/89	

8	4/89
9 & 10	5/8/89 - 5/9/89
11	5/18/89

The government also presented evidence at trial regarding several other uncharged, pre-November 18, 1988 drug offenses which the jury may have found to be the predicate offenses for the C.C.E.

21 U.S.C. § 848(d) requires, as an element of a C.C.E., that a jury find that the person committed a "continuing series of violations" of drug offenses. This "continuing series of violations" has been defined to mean three or more drug offenses.

Prior to November 18, 1988, the C.C.E. statute, 21 U.S.C. § 848, carried a potential sentence of "not less than 10 years and which may be up to life imprisonment." *See* Apx. E at page 43; emphasis added. On November 18, 1988, the statute was amended and, after that date, a C.C.E. conviction carried a potential sentence of "not less than 20 years ..." *See* Apx. F at page 44; emphasis added.

Based on the June 15, 1988 Sentencing Guidelines, Mr. Murr's base offense level for his C.C.E. would have been 32. The sentencing range in the June 15, 1988 Guidelines for an offense level of 32 was 121 to 151 months. *See* Apx. H at page 46.

The jury in Mr. Murr's case was instructed that, to convict Mr. Murr of the C.C.E., the government had to prove three predicate drug violations, "including but not limited to the offenses charged in Counts Two through Twelve and the two distributions of cocaine alleged to have been made, 'between May 1989 and August 1989.' " The District Court did not instruct the jury that it had to agree unanimously as to which three predicate drug offenses Mr. Murr had committed.

This Court has held that, in C.C.E. cases, a jury is required to agree unanimously not only that the accused committed the continuing series of violations, but also which of those violations made up the continuing series. *Richardson v. United States*, 526 U.S. 813, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999).

Mr. Murr previously filed a § 2255 motion in which he challenged his C.C.E. conviction based on *Richardson*. The Sixth Circuit held that the District Court's failure to instruct the jury regarding unanimity was harmless because the jury had unanimously found Mr. Murr guilty of 10 substantive drug offenses. *Murr v. United States*, 200 F.3d 895, 906 (6th Cir.2000).

V. REASONS FOR GRANTING THE WRIT

A. THE DECISION OF THE SIXTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS

OF THIS COURT AS IT FAILED TO RECOGNIZE THAT A MANIFEST MISCARRIAGE OF JUSTICE OCCURRED WHEN MR. MURR WAS SENTENCED IN THE ABSENCE OF A JURY FINDING ON THE SPECIFIC THREE PREDICATE DRUG OFFENSES REQUIRED FOR A C.C.E., IN VIOLATION OF DUE PROCESS OF LAW.

A writ of certiorari should be granted on this issue because the Sixth Circuit's decision is in conflict with decisions of this Court.

A manifest miscarriage of justice occurred when the District Court sentenced Mr. Murr pursuant to the post-November 18, 1988, amended rendition of 21 U.S.C. § 848 which mandated a 20 year minimum term of imprisonment, notwithstanding the fact that the jury had not unanimously agreed on which three predicate drug violations it used to convict Mr. Murr on the C.C.E. charge. The pre-November 18, 1988 provisions of 21 U.S.C. § 848 provided that only a 10 year mandatory minimum sentence was required. The District Court should have sentenced Mr. Murr within the sentencing guidelines range of 121 to 151 months, which range would have applied to him had his mandatory minimum sentence been 10 years.

This Court settled in the cases of *Turner v. United States*, 396 U.S. 420, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970), *Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991) and *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957) that when a conviction is based on alternate ***legal theories*** and one of those theories is deficient, the conviction must be overturned. If, however, a conviction is based on alternate ***factual theories*** and one of the possible factual theories is deficient but another factual theory is not deficient, the conviction may stand based on the sufficient factual theory.

In Mr. Murr's case, the jury may have based his C.C.E. conviction on legally sufficient alternate factual theories (*i.e.,* legally permissible groups of three or more underlying offenses) and, therefore, his conviction on the C.C.E. charge may stand, as found by the Sixth Circuit in *Murr v. United States*, 200 F.3d 895 (6th Cir.2000). However, since it cannot be clearly determined on which three offenses the jury based Mr. Murr's C.C.E. conviction, it cannot be determined which statute should apply and, therefore, the most lenient sentencing statute should apply. Thus, Mr. Murr's sentence should be based on the pre-November 18, 1998 statute which called for a sentence of ***"not less than 10 years ..."***

Mr. Murr was denied due process of law when the

District Court sentenced him pursuant to the amended, post November 18, 1988 provisions of 21 U.S.C. § 848 which required a 20 year minimum sentence. It is well settled that, "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 2327, 53 L.Ed.2d 281 (1977). Any factual finding that influences the determination of the sentencing range must be made by a jury beyond a reasonable doubt to survive Sixth Amendment scrutiny. *See Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). "[A] court's power in sentencing is limited by the facts alleged in the indictment and found by the jury," and, "... any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 2356, 2359 n.10, 2362-32, 147 L.Ed.2d 435 (2000). The *Apprendi* reasoning should apply equally to the statutory mandatory minimum. *See United States v. Ramirez*, 242 F.3d 348, 351-52 (6th Cir.2001) and *Gibson v. United States*, 271 F.3d 247, 257 (6th Cir.2001).

Because the *Indictment* did not indicate, and the jury's verdict did not specify, the dates of the underlying offenses which constituted the "continuing series of offenses" necessary

for the C.C.E. conviction, *Apprendi*, *Turner*, *Griffin* and *Yates* require that Mr. Murr be sentenced only to the least severe sentence of those available to the District Court pursuant to the different statutes.

This is particularly important because it is clear that a jury must find beyond a reasonable doubt any fact which is an element of a crime where that fact exposes a defendant to harsher penalties. The question *Apprendi* left open is its impact where the jury makes no finding as to a fact which is an element of a crime which exposes the defendant to a mandatory minimum sentence not considered in the jury verdict. *See United States v. Champion*, 234 F.3d 106, 110-11 (2nd Cir.2000) ("... the question of whether, after *Apprendi*, a judge's fact findings that create a higher mandatory minimum violate a defendant's right to a jury trial is an open one in this circuit").

The District Court sentenced Mr. Murr to a mandatory minimum sentence which was not clearly supported by the jury's verdict and, therefore, error occurred. This created a variance with the decisions of this Court as reached in *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) (the state bears the burden of proving the absence of heat of passion on sudden provocation beyond a reasonable

doubt to the jury to establish the malice aforethought element of a murder crime which may not be presumed merely on a jury finding that the defendant intended to kill);[4] *Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967) (holding unconstitutional an increase in a defendant's sentencing exposure based upon a post-conviction judicial fact-finding, absent a jury finding beyond a reasonable doubt that the defendant, convicted of an indecent liberties offense, posed a threat of bodily harm to the public, or was a habitual offender and mentally ill); *Castillo v. United States*, 530 U.S. 120, 120 S.Ct. 2090, 147 L.Ed.2d 94 (2000) (fact that machine gun was the type of firearm used during the crime of violence was an offense element to be found by the jury, where finding of the machine gun fact triggered a minimum sentence of 30 years instead of a 5 year sentence for a finding of any firearm); *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999); and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

When *Apprendi* was in this Court, the Court was not

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4 Chief Justice Rehnquist explained *Winship's* holding by stating that, "[it] does require that the prosecution prove beyond a reasonable doubt every element which constutes the crime charged against a defendant. "*Mullaney v. Wilbur*, 95 S.Ct. at 1893 (concurring).

presented with the precise question of whether any fact that increases the statutory minimum term of a sentence is an element of the crime to be found beyond a reasonable doubt by a jury. This Court should address and resolve this issue at this time. *Apprendi*, albeit not expressly overruling *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), effectively eviscerated it. *McMillan*, a 5-4 decision, is an isolated deviation from the due process/Sixth Amendment jurisprudence which preceded and followed it, and should thus yield to the greater weight of authority.

With regard to a C.C.E., this Court has held that the three predicate drug offenses which are required for a C.C.E. conviction are, as a matter of law, elements of the crime and that they, therefore, must be submitted to the jury for its unanimous finding beyond a reasonable doubt. *See Richardson v. United States*, 526 U.S. 813, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999). Where an increased mandatory sentence is triggered by a finding of an important factual matter - in *Castillo* the use of a machine gun, here the date of the commission of the three predicate drug offenses - this Court has always left such an important factual determination to the jury. *See Castillo v. United States*, 120 S.Ct. at 2096.

This Court has consistently required a jury finding beyond a reasonable doubt as held in *Winship*, *Mullaney* and

Patterson v. New York, 97 S.Ct. at 2329 ("*Mullaney* surely held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense").

A review of the long line of this Court's cases from *Winship* through *Apprendi* and their progeny provides support to Mr. Murr's contention that, under the Fifth and Sixth Amendments, Mr. Murr has a right to have a jury find every fact that results in an increase in the severity of punishment imposed upon him, and that, therefore, the District Court violated Mr. Murr's constitutional rights by sentencing him to a higher level of punishment without a specific, unanimous finding by the jury to support the use of the amended, post-November 18, 1988 C.C.E. provisions as the basis for his C.C.E. sentence.

Mullaney compels the conclusion that, after a jury found Mr. Murr guilty beyond a reasonable doubt of the C.C.E. without a finding as to which predicate offenses were the basis for this conviction, he should not have been sentenced under the post-November 18, 1988 version of 21 U.S.C. § 848, absent a jury finding as to the dates upon which the predicate drug offenses occurred. Rather, Mr. Murr should have been sentenced under the pre-November 18, 1988 version of 21

U.S.C. § 848 which would not have subjected him to the 20 year mandatory minimum sentence required under the amended, post-November 18, 1988 version of 21 U.S.C. § 848. The rights of the *Mullaney* defendant were violated when the element of "heat of passion on sudden provocation" was presumed, instead of found by the jury, thereby subjecting him to higher levels of punishment consistent with a murder conviction instead of a manslaughter conviction. Likewise, Mr. Murr's constitutional rights were violated when the District Court failed to require the jury to agree unanimously as to the three predicate drug offenses, thereby subjecting him to higher levels of punishment associated with the amended, post-November 18, 1988 version of 21 U.S.C. § 848, instead of the lower levels of punishment authorized by the pre-November 18, 1988 version of 21 U.S.C. § 848. Accordingly, this Court's decisions and well-settled principles of statutory construction support a finding that the District Court erred in sentencing Mr. Murr under the amended, post-November 18, 1988 version of 21 U.S.C. § 848.

Mr. Murr has certainly been denied the safeguards of due process of law and has been prejudiced when he was sentenced pursuant to a mandatory minimum sentence that should not have applied to him. Sentencing Mr. Murr to approximately seven more years than he would have received violated Mr. Murr's constitutional rights and conflicts with

Supreme Court precedent. *See United States v. Thomas*, 274 F.3d 655, 669 (2nd Cir.2001) (*en banc*) ("[i]t is beyond cavil that imprisonment for an additional 52 months beyond the penalty authorized by Congress, as a direct result of the error of using a drug quantity neither charged nor found by the jury, constitutes prejudice").

Furthermore, the error in Mr. Murr's case seriously affected the fairness and public reputation of the public proceedings. As one circuit has stated,

> "The fundamental precept informing the Supreme Court's decision in *Apprendi* is that it is patently unjust for a defendant to be sentenced for a crime of which he has not been convicted. *See Apprendi v. New Jersey*, 530 U.S. 466, 476-78, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Therefore, should this Court, applying the plain error standard of review, find that *Apprendi* has been violated in this case, it follows a fortiori that treating Gibson's objection to his sentence as waived ***would result in manifest injustice.***"

Gibson v. United States, 271 F.3d at 256 (emphasis added). *See also*, *United States v. Gonzalez*, 259 F.3d 355, 359 (5th Cir.2001) ("[the defendant's] sentence of 78 months' term of imprisonment and 5 years' supervised release obviously exceeds the statutory maximum and as such his sentence is

plainly erroneous. We also find that the additional 18 months' imprisonment and 2 years' supervised release affects [the defendant's] substantial rights;" emphasis added).

As a result of the jury verdict in Mr. Murr's case, the District Court should have, in order to have been constitutionally correct under the *ex post facto* doctrine, sentenced Mr. Murr pursuant to the pre-November 18, 1988 provisions of 21 U.S.C. § 848. Had the District Court sentenced Mr. Murr under the pre-November 18, 1988 provisions of 21 U.S.C. § 848, Mr. Murr would have been sentenced within the guideline range of 121 to 151 months. The District Court, however, declined to sentence Mr. Murr within the authority conferred by the jury verdict; instead, the District Court sentenced Mr. Murr pursuant to the amended, post-November 18, 1988 version of § 848 without any of the requisite findings. Such a sentence triggered a 20 year mandatory minimum sentence. This was an illegal sentence which caused a manifest miscarriage of justice. Mr. Murr's sentence should be vacated and Mr. Murr should be granted a new sentencing hearing at which the District Court should sentence him in the range of 121 to 151 months. Because of the importance of this issue, this Court should grant a writ of certiorari and settle this issue for the proper administration of justice.

B. A MANIFEST MISCARRIAGE OF JUSTICE IN SENTENCING TRIGGERS § 2255'S "INADEQUATE AND INEFFECTIVE" SAFETY VALVE CLAUSE AND, THUS, MAY BE BROUGHT IN A HABEAS CORPUS PETITION PURSUANT TO 28 U.S.C. § 2241.

The writ should be granted on this issue because the Sixth Circuit's decision is in conflict with this Court's decisions of *United States v. Hayman*, 342 U.S. 205, 72 S.Ct. 263, 96 L.Ed. 232 (1952), *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963) and *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963). The courts below in Mr. Murr's case denied his claim because, *inter alia*, Mr. Murr did not profess "actual innocence"of the C.C.E. charge, and, therefore, § 2255's "inadequate or ineffective" savings clause was unavailable to Mr. Murr. *See* Apx. A at page 24 and Apx. B at page 33. This is contrary to the previous rulings of this Court and, therefore, *certiorari* should be granted in order to resolve this conflict between the Sixth Circuit's holding and the holdings of this Court.

It was appropriate for Mr. Murr to present his claim in a *habeas corpus* application pursuant to 28 U.S.C. § 2241

because, although Mr. Murr cannot now file his claim pursuant to a § 2255 motion,[5] it, "appears that the remedy by [successive § 2255] motion is inadequate or ineffective to test the legality of [Mr. Murr's] detention" 28 U.S.C. § 2255. Because the failure to allow for *habeas* review would cause a fundamental, manifest miscarriage of justice, Mr. Murr is entitled to file his claim pursuant to § 2241.

28 U.S.C. § 2255 specifically states that an exception exists to the general rule that a federal prisoner must use § 2255 instead of seeking a writ of *habeas corpus* under § 2241:

> "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or

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5 The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) precludes Mr. Murr from filing a second or successive motion for postconviction relief pursuant to 28 U.S.C. § 2255 because he is not bringing a claim based upon, "(1) newly discovered evidence ...; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255.

> that such court has denied him relief, ***unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."***

28 U.S.C. § 2255 (emphasis added); *see* Apx. G at page 45.

The First, Second, Third, Fourth, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits have held that relief is available under § 2241 when § 2255 is "inadequate and ineffective," but generally ***only when a defendant claims "actual innocence."*** *See United States v. Barrett*, 178 F.3d 34, 57 (1st Cir.1999), *cert. denied*, 528 U.S. 1176 (2000); *Cephas v. Nash*, 328 F.3d 98, 104 (2nd Cir.1997); *In Re Dorsainvil*, 119 F.3d 245, 249, 251 (3rd Cir.1997); *In re Jones*, 226 F.3d 328, 334 (4th Cir.2000); *Charles v. Chandler*, 180 F.3d 753, 757 (6th Cir.1999); *In re Davenport*, 147 F.3d 605, 611 (7th Cir.1998); *United States v. Lorentsen*, 106 F.3d 278, 279 (9th Cir.1997); *Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir.1996); and *Wofford v. Scott*, 177 F.3d 1236, 1244 (11th Cir.1999).

In *Triestman v. United States*, 124 F.3d 361 (2nd Cir.1997), the Second Circuit held that a federal prisoner may seek § 2241 *habeas corpus* relief in, "the set of cases in which the petitioner cannot, for whatever reason, utilize § 2255, and in which ***the failure to allow for collateral review would raise serious constitutional questions."*** *Triestman v. United States*, 124 F.3d at 377 (emphasis added). *But see*,

Reyes-Requena v. United States, 243 F.3d 893, 903 n.28 (5th Cir.2001), *In re Davenport*, 147 F.3d at 611 and *Wofford v. Scott*, 177 F.3d at 1243 criticizing *Triestman*. In permitting an assertion of a *Bailey*[6] claim under § 2241(c)(3) when the issue was foreclosed by the requirements of the AEDPA, the Second Circuit stated:

> "Today, federal courts continue to retain jurisdiction to entertain habeas corpus petitions from federal prisoners "in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2241(c)(3).
>
> "In 1948, by enacting § 2255, which channels collateral attacks by federal prisoners to the sentencing court (rather than to the court in the district of confinement) so that they can be addressed more efficiently, Congress restricted ***(but did not eliminate) the right of federal prisoners to proceed under § 2241(c)(3).*** *See generally United States v. Hayman*, 342 U.S. 205, 210-19, 72 S.Ct. 263, 267-72, 96 L.Ed. 232 (1952) (detailing the history and purpose of §

---

6 *Bailey v. United States*, 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995).

> 2255). Section 2255 was not intended to limit the collateral rights of federal detainees in any way. It was simply designed to serve as a convenient substitute for the traditional habeas corpus remedy. *See id.* at 219, 72 S.Ct. at 272."

Triestman v. United States, 124 F.3d at 373 (emphasis added).

Although the circuit courts may have held that a defendant must allege "actual innocence" in order to utilize § 2255's savings clause to seek relief under § 2241, this is an open question in this Court. As the Fifth Circuit has stated,

> "[t]o date, the Supreme Court has not provided much guidance as to the factors that must be satisfied for a petitioner to file under habeas corpus provisions such as § 2241. In *United States v. Hayman*, the Court simply observed that habeas corpus writs are available when § 2255 is inadequate or ineffective. *See* 342 U.S. 205, 223, 72 S.Ct. 263, 96 L.Ed. 232 (1952); [additional citation omitted]."

Reyes-Requena v. United States, 243 F.3d at 902. Thus, the question of when § 2255 is, "inadequate or ineffective to test the legality of a [petitioner's] detention" must still be resolved by this Court. Mr. Murr requests that this Court review and resolve this question and hold that a defendant may bring a § 2241 action if he or she is actually innocent, if there is

sentencing innocence or if any other manifest miscarriage of justice would occur if the defendant is procedurally denied relief.

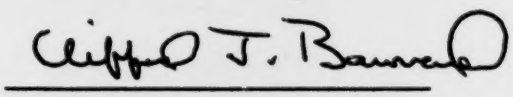
United States v. Hayman, 342 U.S. 205, 72 S.Ct. 263, 96 L.Ed. 232 (1952), *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963) and *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963) have never been overruled by this Court and the courts below are therefore bound by them. Because the circuit courts' decisions are in conflict with these cases, this Court should grant *certiorari* on this issue.

VI. CONCLUSION

For the reasons stated above, a writ of certiorari should be issued to review the matters presented in this petition.

DATED this 16th day of June, 2003.

Respectfully submitted,



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APPENDIX A

FILED

United States District Court

Eastern District of Kentucky

at Ashland

Nov 21 2001

LESLIE G. WHITMER

ClerkUNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY

LEXINGTON

CIVIL ACTION NO. 01-CV-260-HRW

ROBERT DALE MURR, PETITIONER,

MEMORANDUM OPINION AND ORDER

VS.

MARY ELLEN THOMS, WARDEN, RESPONDENT.

This matter is before the court for consideration of the petitioner's 28 U.S.C. § 2241 writ of habeas corpus [Record No. 1]; petitioner's brief in support of his application for a writ

of habeas corpus [Record No. 6]; respondent's response to the petition [Record No. 13]; and petitioner's reply [Record No. 16] to the respondent's response.

CLAIM

Petitioner asserts a collateral attack on his sentence based upon the holding in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 2356, 147 L.Ed.2d 435 (2000), and the rule of lenity. Petitioner, by counsel contends his conviction should be vacated because it was obtained in violation of his Fifth Amendment due process rights and his Sixth Amendment right to a trial by jury. Petitioner asserts he was deprived of his right to have the jury determine unanimously what three predicate drug violations/acts were relied upon to sentence petitioner for Continuing Criminal Enterprise (CCE). Petitioner was convicted of acts which took place *prior* to November 18, 1988, and acts which took place *after* November 18, 1988. Because there was no jury designation as to which three acts the jury relied upon to convict petitioner for CCE, the petitioner asserts it cannot be determined if petitioner should have been punished under pre- or post-November 18, 1988 law. The November 18, 1988 date is significant, because, prior to November 18, 1988, the relevant sentencing status, 21 U.S.C. § 848 mandated a 20-year minimum sentence. Petitioner was sentenced pursuant to the post-November 18, 1988 amended version of 21 U.S.C. §

848, even though it was undeterminable which three offenses were relied upon and which statute should have applied. Petitioner asserts that, pursuant to Apprendi and the rule of lenity, his 240-month (20 years) only sentence should have been within the 151 (12 years and 7 months) to 188 (15 years and 8 months) range.

Petitioner, by counsel, relies on the Apprendi reasoning that "a court's power in sentencing is limited by the facts alleged in the indictment and found by the jury," and that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 2356, 147 L.Ed.2d 435 (2000). Petitioner asserts the Apprendi reasoning should apply equally to the statutory minimum as it does to the statutory maximum.

Petitioner, by counsel, further contends that the rule of lenity would requrie that his sentence be based upon the most lenient statute which could apply to the jury's findings. As in petitioner's situation there are no specific jury findings about which three offenses (pre- or post-November 18, 1988) were relied upon, therefore, allegedly, petitioner's sentence should be based upon the pre-November 18, 1988 statute which had a 10-year minimum sentence and a life maximum sentence.

Additionally, petitioner relies upon Apprendi to assert

his indictment was flawed and denied him due process because it failed to allege an essential element of the CCE crime charged, in that it did not indicate the dates of the underlying offenses constituting the CCE offense.

RELIEF

Petitioner seeks to be resentenced under the pre-November 18, 1988 version of 21 U.S.C. § 848 with a 151-to-188-month range instead of to his current 240-month sentence.

JURISDICTION

Petitioner asserts this court has jurisdiction pursuant to 28 U.S.C. § 2241 because the procedures in 28 U.S.C. § 2255 are "inadequate and ineffective" to present petitioner's claims for relief. Petitioner has not filed a 28 U.S.C. § 2244 motion for permission to file a second or successive § 2255 motion with the sentencing court because he, by counsel, states the claims he is presenting are not based on newly discovered evidence and are not based on a new rule of constitutional law which has been made retroactive to cases on collateral review by the Supreme Court. Petitioner reasons that this matter must be brought before this court pursuant to 28 U.S.C. § 2241 because petitioner is in federal custody pursuant to a judgment and commitment of a United States District Court, specifically, the United States District Court for the Eastern District of Kentucky, the undersigned presiding, and he is

in custody in violation of the laws of the United States and it "appears that the remedy by [successive § 2255] motion is inadequate or ineffective to test the legality of [petitioner's] detention." 28 U.S.C. § 2255.

Petitioner further acknowledges that he is barred from bringing his Apprendi-based claims in a second or successive § 2255 motion until the Supreme Court rules that Apprendi may be applied retroactively to cases on collateral review. Therefore, petitioner, by counsel, concludes that until such a Supreme Court ruling is forthcoming, a § 2255 motion itself is "inadequate and ineffective" to test the legality of petitioner's detention, and a § 2241 petition is the proper vehicle by which to seek relief for what the petitioner characterizes as his Richardson v. United States, 526 U.S. 813, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999), claims. While petitioner admits he has previously brought these "Richardson claims" before this court pursuant to 28 U.S.C. § 2255 sentencing court did not have the benefit of the Apprendi holding in considering the issue, therefore, now, despite the fact that Apprendi is not applicable currently to cases on collateral review, he should be permitted to circumvent the normal and expected route of collateral review to gain the benefit of the influence of an opinion's holding, which opinion would, if he followed normal channels, be currently considered inapplicable.

A prisoner may not utilize the "inadequate or

ineffective" savings clause in § 2255 to resort to § 2241 where the prisoner is not alleging actual innocence. Charles v. Chandler, 180 F.3d 753, 757 (6th Cir. 1999). The petitioner is not alleging actual innocence of the CCE conviction, but he is merely challenging the sentence which was rendered for said conviction. Consequently, under the "savings clause" of § 2255, petitioner may not bring the herein asserted claims.

Essentially, petitioner is attempting to use a derivative of or an extension of the holding in Apprendi, which holding, much less a derivative thereof, is not available on a § 2241 collateral review of his sentencing. United States v. Peterman, 249 F.3d 458, 462 (6th Cir. 2001).

The fundamental concept of the alleged sentencing error asserted by the petitioner, but for the additional argument derived from an extension of the Apprendi holding, has previously been presented to the sentencing court via § 2244 and has been rejected. Petitioner has had his "one bite at the apple." The holding in Apprendi affords petitioner no additional legal foundation for his asserted sentencing error. Petitioner currently submits a sentencing error claim that is nothing new, that was available at the time he was sentenced, and that is afforded no additional credibility by the holding in Apprendi. While counsel has cleverly worked the quasi-Apprendi "smoke and mirrors" in an attempt to now get an issue before the court whose time has passed, the ruse does not

circumvent the rules.

Tot he extent that it can be said petitioner is presenting an Apprendi claim (which he is not), Apprendi may not be applied retroactively to cases on collateral review. In re Clemmons, 259 F.3d 489 (6th Cir.2001). On the Supreme Court may make Apprendi so applicable. Tyler v. Cain, ___ U.S. ___, 121 S.Ct. 2478, 2001 WL 720703 (June 28, 2001).

RULE OF LENITY

The rule of lenity argument regarding application of the pre- or post-November 18, 1988 version of 21 U.S.C. § 848 was first available at the time petitioner was sentenced (April 3, 1992), was again available on direct appeal, and was finally available when petitioner filed his first § 2255 motion. Thus, petitioner has waived his rule of lenity argument. Murr v. United States, 200 F.3d 895, 900 (6th Cir. 2000). He may not now revive that waived argument by attempting to peripherally attach it to a fairly new case holding that is not retroactively applicable in the context of this or any collateral review.

The rule of lenity applies to an issue involving interpreting the language of one statute. United States v. Boucha, 236 F.3d 768, 774 (6th Cir. 2001). Petitioner attempts to apply the rule of lenity to an issue which does not involve statutory interpretation but which, instead, involves a question of which of two separate statutes is applicable. No statutory

interpretation of internal statutory language is involved in the petitioner's situation. Thus, petitioner, by counsel, seeks not an application of the rule of lenity but an extension of the rule of lenity and, thereafter, an application of said extension. The court being without any authority upon which to extend the rule of lenity to a judicial choice of applicable statutes in the absence of a jury having been afforded the opportunity to make such a determination, no such extension and/or application of the rule of lenity is in order.

FOUNDATION EXITS

The jury convicted petitioner of more than three predicate crimes that occurred after November 18, 1988. Thus, the foundation exists to support the sentencing court's application of the post-November 18, 1988 version of 21 U.S.C. § 848 to sentence petitioner. Simply because the jury did not designate which of the predicate offenses it relied upon for the CCE conviction does not mean that there is no foundation for the currently imposed sentence. As the rule of lenity is inapplicable, and as Apprendi is both inapplicable and not on-point in that it applies when the statutory maximum is exceeded, it cannot be said petitioner has presented an error.

CONCLUSION

Accordingly, IT IS ORDERED as follows:

a. This action is DISMISSED, *sua sponte*, without prejudice.

b. This is a FINAL and APPEALABLE order.

c. The court certifies that any appeal would not be taken in good faith. 28 U.S.C. § 1915(a)(3); McGore v. Wrigglesworth, 114 F.3d 601, 610-11 (6th Cir.1977); Kincade v. Sparkman, 117 F.3d 949 (6th Cir.1997).

This the 21 day of November, 2001.

s/
Henry R. Wilhoit, Jr.
Senior Judge

APPENDIX B

NOT RECOMMENDED FOR FULL--TEXT PUBLICATION

Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

United States Court of Appeals, Sixth Circuit

Robert Dale MURR, Petitioner-Appellant,

v.

Maryellen THOMS, Warden, Respondent-Appellee.

No. 01-6592

March 19, 2003.

Before: MERRITT and BATCHELDER, Circuit Judges; and DUPLANTIER, [FN*] District Judge.

ALICE M. BATCHELDER, Circuit Judge. Petitioner Robert Murr, a federal inmate currently incarcerated at the Federal Medical Center at Lexington, Kentucky, appeals the district court's order denying his application for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. Petitioner argues he was improperly sentenced for a continuing criminal enterprise conviction, 21 U.S.C. § 848, and that a motion pursuant to 28 U.S.C. § 2255 would be inadequate and ineffective to raise this claim. For the following reasons, we will affirm the order of the district court.

BACKGROUND

A jury convicted Robert Murr of one count of conspiracy to possess with intent to distribute sixty-two kilograms of cocaine, 21 U.S.C. § 846, ten counts of possession with intent to distribute cocaine and aiding and abetting the possession and distribution of cocaine., 21 U.S.C. § 841(a) and 18 U.S.C. § 2, and one count of conducting a continuing criminal enterprise ("CCE"). 21 U.S.C. § 848. The conspiracy conviction was subsequently vacated as a lesser-included charge of the CCE conviction and one of the substantive counts was subsequently set aside as duplicitous. After a five-day sentencing hearing, the court imposed a 260-month sentence on all counts to run concurrently. In sentencing the petitioner, the court relied upon the post-November 1988 version of the CCE statute, which contained a twenty-year minimum mandatory sentence. When petitioner appealed his conviction, but not his sentence, the government filed a cross-appeal on the issue of sentencing. The court affirmed the convictions but reversed petitioner's sentence for error and remanded the case for resentencing. During the resentencing, petitioner argued he should receive a 240-month sentence instead of the 260-month sentence originally imposed. The court used the twenty-year minimum mandatory contained in the post-November 1988 CCE statute and agreed to re-sentence petitioner to 240-months. At no time did petitioner object to the sentencing court's use of the post-

November 1988 version of 21 U.S.C. § 848.

Petitioner then filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. As part of that motion, petitioner argued that the trial court had failed properly to instruct the jury that they needed to agree unanimously on the three underlying drug offenses that formed the basis for the continuing series of violations under the CCE statute. *See Richardson v. United States,* 526 U.S. 813, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999). The trial court denied the motion and this court affirmed, holding that the failure to instruct the jury was harmless error because the jury had unanimously found petitioner guilty of ten substantive drug offenses. *Murr v. United States,* 200 F.3d 895, 906 (6th Cir.2000). Again, during the § 2255 proceedings, petitioner failed to raise the sentencing court's use of the post-November 1988 version of the CCE statute. Petitioner has not requested permission from this court to file a second or successive § 2255 motion.

Petitioner next filed an Application for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. In his application, petitioner argues that the first five substantive offenses for which he was convicted occurred prior to the November 1988 revision of 21 U.S.C. § 848 and that the remaining five offenses occurred after the revision. According to petitioner's argument, because the trial court failed to instruct the jury properly, it is impossible to know which three offenses the

jury relied upon when it found petitioner guilty of the CCE. Since the jury could have used three pre-November 1988 offenses when it found petitioner guilty of the CCE, and the pre-November 1988 version of the CCE statute contained a ten-year minimum mandatory sentence (rather than the twenty-year minimum mandatory of the current version), petitioner argues he should be re-sentenced according to the prior version of 21 U.S.C. § 848. Under the sentencing guidelines, a ten year minimum mandatory would mean a sentencing range of 121 to 151 months. Petitioner also argues that a motion pursuant to 28 U.S.C. § 2255 would be inadequate and ineffective to raise this claim. The district court dismissed the action, *sua sponte,* and petitioner's timely appeal followed.

ANALYSIS

This court reviews de novo a district court's legal conclusion in a habeas corpus decision. *United States v. Peterman,* 249 F.3d 458, 461 (6th Cir.2001). Before reaching the merits of petitioner's appeal, we must determine if this court has jurisdiction to hear this case. The fifth paragraph of 28 U.S.C. § 2255, the "savings clause," provides that:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the

> applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

See Charles v. Chandler, 180 F.3d 753, 755 (6th Cir.1999). A federal prisoner may file a habeas petition to challenge the imposition of his sentence only if the remedy afforded under § 2255 is inadequate or ineffective. *Id.* at 756. "[T]he § 2255 remedy is not considered inadequate or ineffective simply because § 2255 relief has already been denied, or because the petitioner is procedurally barred from pursuing relief under § 2255, or because the petitioner has been denied permission to file a second or successive motion to vacate. It is the petitioner's burden to establish that his remedy under § 2255 is inadequate or ineffective." *Id.* (internal citations omitted).

Petitioner admits that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) precludes him from filing a second or successive motion for post- conviction relief pursuant to 28 U.S.C. § 2255 because his claim is not based upon newly discovered evidence or a new rule of constitutional law which has been made retroactive to cases on collateral review by the Supreme Court. Instead, petitioner argues that

the failure to allow for collateral review in this case would raise serious constitutional questions. Specifically, petitioner claims that the Supreme Court's opinion in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the rule of lenity, and the *ex post facto* doctrine require that his sentence be reversed and that he be re-sentenced under the pre-November 1988 version of 21 U.S.C. § 848.

We agree with the district court and find that *Apprendi.* the rule of lenity, and the *ex post facto* doctrine are all inapplicable to petitioner's appeal. Regardless of the merits of petitioner's *Apprendi* argument, this circuit has squarely held that *Apprendi* is not applicable to cases on collateral review because the Supreme Court has not explicitly authorized such retroactive application. *In re Clemmons,* 259 F.3d 489, 493 (6th Cir.2001)(noting that "[t]he Supreme Court's decision in *Tyler [v. Cain,* 533 U.S. 656, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001)] affirms the reasoning of six circuits that under the plain language of AEDPA, the Supreme Court makes new constitutional rules retroactive to cases on collateral review by explicitly stating their collateral availability or applying it in a collateral proceeding."). Petitioner's rule of lenity and *ex post facto* claims were first available on direct appeal and were then available when petitioner filed his § 2255 motion; accordingly, petitioner has waived these arguments and they cannot be revived in a § 2241 application for habeas corpus.

"It is well- settled law that failure to raise an argument at trial or on direct appeal is waived on collateral review under § 2255, absent a showing of both cause and actual prejudice." *Murr,* 200 F.3d at 900 (citing *United States v. Frady,* 456 U.S. 152, 164-65, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982)).

Finally, although this circuit has yet to decide "whether or not a claim of 'actual innocence,' ... might permit a petitioner under certain circumstances to utilize § 2244 as a means of circumventing § 2255's requirements for filing a second or successive habeas petition," *Charles,* 180 F.3d at 757, petitioner has clearly failed to claim "actual innocence" in this application. As the panel noted in *Charles*:

> No circuit court has to date permitted a post-AEDPA petitioner who was not effectively making a claim of 'actual innocence' to utilize § 2241 (via § 2255's 'saving clause') as a way of circumventing § 2255's restrictions on the filing of second or successive habeas petitions.

Id.; see also Martin v. Perez, No. 01-5690, 2003 U.S.App. LEXIS 2644, * 11 (6th Cir. Feb. 13, 2003). We again need not decide if a claim of "actual innocence" might permit a § 2241 motion in this instance, since Petitioner makes no such claim.

CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

FN* The Honorable Adrian G. Duplantier, United States District Judge for the Eastern District of Louisiana, sitting by designation.

APPENDIX C

Fifth Amendment to the United States Constitution:

"No person shall ... be deprived of life, liberty, or property, without due process of law ..."

APPENDIX D

Sixth Amendment to the United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

APPENDIX E

21 U.S.C. § 848 effective prior to November 18, 1988:

"§ 848. Continuing criminal enterprise

"Penalties: forfeitures

"(A) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine ..."

APPENDIX F

21 U.S.C. § 848 effective November 18, 1988:

"§ 848. Continuing criminal enterprise

"Penalties: forfeitures

"(A) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine ..."

APPENDIX G

28 U.S.C. § 2255 in pertinent part:

"...

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

"...

"A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

"(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

"(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

APPENDIX H

U.S.S.G.. § 2D1.5 Continuing Criminal Enterprise

(effective June 15, 1988)

"(a) Base Offense Level:

"(1) 32 for the first conviction of engaging in a continuing criminal enterprise; or

"(2) 38 for the second or any subsequent conviction of engaging in a continuing criminal enterprise; or

"(3) 43 for engaging in a continuing criminal enterprise as the principal administrator, leader, or organizer, if either the amount of drugs involved was 30 times the minimum in the first paragraph [50 KG Cocaine] (i.e., the text corresponding to Level 36) of the Drug Quantity Table or 300 times the minimum in the third paragraph [5 KG Cocaine] (i.e., the text corresponding to Level 32), or the principal received $10 million in gross receipts for any twelve-month period."